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Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-1100

No.-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID J. HELDSTAB,
PETITIONER

-vs-

FRANK LISKA, et al.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

David J. Heldstab, pro se
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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

I.

QUESTIONS PRESENTED FOR REVIEW

1. Did petitioner's 42 U.S.C Section 1983 Civil Rights action filed *pro se* fail to allege sufficient factual matter to survive a motion to dismiss?

2. Was petitioner's 42 U.S.C. Section 1983 Civil rights action dismissed solely because petitioner was *pro se* ?

II.

THE PARTIES

PLAINTIFF:

1. David J. Heldstab

DEFENDANTS:

1. Frank Liska, Milwaukee Co. Court Commissioner
2. Thomas Doherty, Milwaukee Co. Circuit Judge
3. William Haese, Milwaukee Co. Circuit Judge
4. Raymond Kress, Milwaukee Co. Calendar Clerk, Milwaukee Co. Circuit Courts
5. Joanne Kelly, Clerk, Milwaukee Co. Circuit Court (Branch 27)
6. Unknown and unidentified Milwaukee Co. Circuit Court employees herein denominated as John Doe I, John Doe II, John Doe III
7. Janet Resnick
8. Sidney Sodos
9. Jacobson, Sodos & Krings, S.C., Milwaukee
10. Catherine Bichler

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III.

THE REPORTS

The decisions of both the District Court and the Court of Appeals below were unreported. They are set out herein in the Appendix.

IV.

JURISDICTION

This case was dismissed in the District Court for the Eastern District of Wisconsin on October 3, 1989. Petitioner timely appealed to the Court of Appeals for the Seventh Circuit which affirmed the dismissal on August 20, 1990.

Petitioner believes that 28 U.S.C. 1254 and 28 U.S.C. 2101 confer jurisdiction on this Court.

Petitioner brought this action pursuant to 42 U.S.C. sections 1983, 1985(2) and 1985(3). The text of these statutes are set out in the appendix.

V.

STATEMENT OF THE CASE

Petitioner filed his pro se Civil Rights action in the district court on July 22, 1988 and invoked the jurisdiction of that court pursuant to 28 U.S.C. sections 1331, 1343(3) and (4) and 42 U.S.C. sections 1983, 1985(2) and (3).

The essence of petitioner's complaint was that the defendants conspired to deny him his civil rights by corruptly deciding in advance to rule against petitioner in a landlord-tenant circuit court action by surreptiously providing his pro

se opponent with free legal representation and then corruptly mulcting the fees for this representation from petitioner pursuant to Wisconsin's frivolous action statute 814.025.

VI.
ARGUMENT

Petitioner argues that the courts below have far departed from the accepted and usual treatment of a pro se civil rights action grounded in conspiracy by dismissing petitioner's action on the pleadings instead of his proofs when petitioner had no opportunity to discover additional facts within the exclusive control of the defendants thereby departing from this Court's guidelines set down in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957) and Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594.

In Conley , this Court held that a complaint could not be dismissed unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. The courts below ruled that petitioner could not prove any set of facts in support of his claim even though petitioner pleaded much more than a minimal amount of specific factual matter and had no opportunity to discover more. In paragraph 21 alone of petitioner's Complaint, he adduced no fewer than 18 cogent specific factual allegations—far and away more than would be required to permit a proper inference of a conspiracy

to be drawn.

Petitioner further argues that the courts below rendered their decisions in direct conflict with another district court and this Court: In Lewis v. Green, 629 F.Supp. 546 (D.D.C. 1986), a case grounded in conspiracy, the court found, at p. 553, that allegations that a law firm and an attorney had conspired with a Judge and District of Columbia officials to violate the constitutional rights of the prisoner class was sufficient to survive a motion to dismiss even though unsupported by any facts. The Lewis court here cites this Court's Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173 and Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 decisions in support.

Dated this 12th day of December, 1990 at Milwaukee, WI

David J. Heldstab, Petitioner

VII.
THE APPENDIX

42 U.S.C. Section 1983-Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Sec. 1985(2)-Obstructing justice; intimidating party, witness, or juror:

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or

indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

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42 U.S.C. Sec 1985(3)-Depriving persons of rights or privileges:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector

for president or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID HELDSTAB,

Plaintiff

DECISION AND ORDER

88-C-768 (JPS)

v.

FRANK LISKA, MILWAUKEE COUNTY COURT COMMISSIONER, THOMAS DOHERTY, MILWAUKEE COUNTY CIRCUIT JUDGE (BRANCH 27), WILLIAM HAESE, MILWAUKEE COUNTY CIRCUIT JUDGE (BRANCH 22), RAYMOND KRESS, CALENDAR CLERK, MILWAUKEE COUNTY CIRCUIT COURTS, JOANNE KELLY, CLERK, MILWAUKEE COUNTY CIRCUIT COURTS (BRANCH 27), UNKNOWN AND UNIDENTIFIED MILWAUKEE COUNTY CIRCUIT COURT EMPLOYEES HEREIN DENOMINATED JOHN DOE 1, JOHN DOE II, JOHN DOE III. ALL OF THE ABOVE BOTH IN THEIR RESPECTIVE INDIVIDUAL AND IN THEIR RESPECTIVE OFFICIAL CAPACITIES.

JANET RESNICK, ATTORNEY, LANSER AND RESNICK, MILWAUKEE, SIDNEY SODOS, ATTORNEY, JACOBSON, SODOS & KRINGS, S.C., MILWAUKEE, THE LAW FIRM OF JACOBSON, SODOS & KRINGS, S.C., MILWAUKEE CATHERINE BICHLER, 7145 W. KATHRYN AVENUE, MILWAUKEE, IN THEIR RESPECTIVE INDIVIDUAL CAPACITIES,

Defendants.

A P P E A R A N C E S:

For Plaintiff Appearing Pro Se:

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Catherine Bichler rented an apartment from David Heldstab for $230.00 per month. She also paid a $225.00 security deposit. On or about October 28, 1985 Ms. Bichler left written notice in plaintiff's mailbox notifying him that she intended to vacate on November 1, 1985. Plaintiff then confronted Ms. Bichler and demanded the $230.00 rent for the month of November, evidently on the grounds that she did not give the 28 day notice required by statute. Ms. Bichler refused to pay. Plaintiff then initiated an action in Milwaukee County Small Claims Court.

The case was heard by Court Commissioner Frank Liska. Commissioner Liska's notes of the hearing (exhibit C to plaintiff's complaint) reflect his ruling that Bichler lose her security deposit. However, plaintiff apparently thought that he should get <u>both</u> the security deposit <u>and</u> the November rent.

Plaintiff appealed to the Milwaukee County Circuit Court, and his case was assigned to Judge Thomas Doherty. Plaintiff alleges that Judge Doherty's clerk Joanne Kelly failed to mail a notice of scheduling conference to him. However, plaintiff did appear at the scheduling conference, at which time he requested the Judge recuse himself. Judge Doherty did so.

The case was then assigned to Judge William Haese. Plaintiff filed a motion for summary judgment against Ms. Bichler. The law firm of Jacobson, Sodos & Krings appeared for Ms. Bichler; Attorney Janet Resnick filed the answer and

Attorney Sidney Sodos appeared at the summary judgment hearing. The court on its own motion granted summary judgment to Bichler and also awarded her attorney's fees for having to defend a frivolous action.

The plaintiff then sought remedy in this court pursuant to 42 U.S.C. 1983, 1985(2) and 1985(3). He alleged that there was an elaborate conspiracy among the above-mentioned persons to deny him due process and equal protection. Each of the defendants has moved to dismiss on various grounds.

Before proceeding to the substance of plaintiff's claims, it is necessary to decide whether plaintiff has stated a claim under any of the civil rights sections. Since plaintiff is proceeding pro se, it is necessary for the court to construe his complaint liberally. This does not, however, relieve him of his obligation to allege adequate factual basis for each of his claims. Therefore, the court will discuss the adequacy of plaintiff's factual basis for proceeding under each civil rights section.

I. 42 U.S.C. 1985(2) CLAIM

42 U.S.C. 1985(2) contains two clauses and a cause of action may be stated under either or both. Since the plaintiff does not specify otherwise the court will assume that he meant to bring his cause of action under each clause. The first clause reads:

If two or more persons in any state or territory conspire to deter, by force, intimidation, or threat,

any party or witness any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit jury in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or his being or having been such juror.

42 U.S.C. 1985(2) (clause 1). This clause has no applicability to this set of facts for two reasons. First, this clause pertains to actions "in any court of the United States." On its face alone, it might appear (as it apparently did to plaintiff) that this clause applies to all courts within the physical boundaries of the United States. However, the courts have held that this phrase rather applies to the courts that are part of the federal judicial system. See Bell v. City of Milwaukee, 746 F.2d 1205, 1233(7th Cir. 1984). The plaintiff's factual allegations make no reference to the federal courts.[1]

Second, plaintiff's claim is not that anyone conspired to deter, intimidate or threaten him. Rather, plaintiff's claim is that a large number of public and private persons conspired to deny him fair hearings. No element of force is implied. Therefore, in light of the fact that plaintiff's case did not arise in federal court and no element of force was alleged, plaintiff has not stated a cause of action under the first clause of sec. 1985(2)

Turning to the second clause of 42 U.S.C. 1985(2), plaintiff has not stated a cause of action either. The second clause reads:

> Or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any state or territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S.C. 1985(2) (clause 2). Again, on its face this clause may appear to pertain to plaintiff's claim. However, the United States Supreme Court has examined the history of the clause and has ruled that a cause of action under the second clause is valid only where there is racial or otherwise class-based invidiously discriminatory animus. Kush v. Rutledge, 460 U.S. 719, 725-26 (1982), citing Griffin v. Breckinridge, 403 U.S. 88, 102 (1971); see also Bell, 746 F.2d at 1233. Plaintiff has made no allegations in his complaint that the alleged conspiracy against him was based on racial or otherwise class-based animus. Therefore, he has no claim under the second clause of sec. 1985(2). Plaintiff's 1985(2) claim is therefore dismissed.

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1 Plaintiff has entitled one section of his complaint "Compendium of Recent Federal and State Court Activity," perhaps for the purpose of attempting to comply with the "federal court" requirement. However, this compendium" makes no relevant references to the federal courts arising out of this action. The plaintiff's federal references all apply to other federal lawsuits plaintiff has pending or has had dismissed.

II. 42 U.S.C. 1985(3) CLAIM

42 U.S.C. 1985(3) reads in pertinent part:

(clause 1) If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; (CLAUSE 2) or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his supporter advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy.

42 U.S.C. 1985(3). Obviously, in the first clause, the refenence to conspiracies "to go in disguise on the highway" has no applicability to this action. However, the reference in the first clause to a conspiracy to hinder authorities from securing equal protection of the laws for all has possible application. Unfortunately for plaintiff, however, the first clause of 1985(3) is subject to the same requirement as the second clause of 1985(2), namely that the plaintiff allege racial or otherwise class-based invidiously discriminatory animus. Kush, 460 U.S. at 725-26. As noted above, plaintiff has made no such class-based allegations. For this reason, plaintiff cannot bring a claim under the first clause of 198

The second clause of 1985(3) similarly is not

relevant to this action, since it deals with conspiracies to hinder voting. Obviously, no claim could be brought under that clause on these facts either. Plaintiff's 1985(3) claim is therefore dismissed.

III. 42 U.S.C. 1983 CLAIM

The court turns now to the question of whether plaintiff has a claim under 42 U.S.C. 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, amy citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. 1983. An initial issue here is whether the plaintiff has adequately alleged "state action" and "color of law", which are conditions necessary to bring a section 1983 action. The issue is not an easy one, though to plaintiff it may appear so by virtue of the fact that state judicial personnel are involved with private persons. As one respected commentator has stated, "(t)he hardest state action problems of all arise where private persons or entities act in a situation where government is also involved." S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 73 (2nd ed. 1986).

The first step in resolving the state action issue is to consider whether the judicial defend-

ants[2] have judicial immunity. If the judicial defendants have immunity, the court must reach the question of whether the private persons are so "connected" to the lawsuit that an action may be maintained against them.

A. JUDICIAL IMMUNITY

The doctrine of judicial immunity goes back at least as far as Bradley v. Fisher, 80 U.S. 335 (1872). In a recent case, the Seventh Circuit quoted Bradley with approval, and synopsized the five considerations in support of judicial immunity made there.

> First, a judge must be free to make decisions without fear of personal consequences. Second, because litigation necessarily involves controversy and competing interests, losing parties may be quick to ascribe malevolent motives to a judge. Third, a qualified "good faith" immunity would be virtually worthless because of the ease of alleging bad faith. Fourth, the prospect of defending civil damage actions would force judges to employ otherwise unnecessary meticulous record keeping and would render judges less inclined to rule forthrightly. Finally, other safeguards, such as appeal and impeachment reduce the need for private rights of action for damages against judges. See Bradley, 80 U.S., 13 Wall, at 347-54.

Eades v. Sterilinske, 810 F.2d 723,725 (7th Cir.19

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2 Judge Doherty, Judge Haese and Court Commissioner Liska are collectively referred to in this manner for ease of reference. The court finds Commissioner Liska to have been without question acting in a judicial capacity. See Ross v. Arnold, 575 F.Supp. 1494-95 (E.D.Wis. 1983) ("The doctrine (of judicial immunity) is fully applicable to suits, such as the present action, maintained under section 1983...and it extends to judges of every status in the judicial

The critical inquiry in analyzing judicial immunity is whether the judicial defendants' actions were judicial acts so as to shield them from liability for damages. Eades, 810 F.2d at 725. The Supreme Court in Stump v. Sparkman, 435 U.S. 349 (1978) developed a two part test to determine whether a judicial act was at issue:

1. The conduct in question must be the kind normally performed by a judge;

2. The plaintiff must have been dealing with the judge in his judicial capacity.

There is no question that both of these elements have been met by each of the judicial defendants. Court Commissioner Liska was the presiding judicial officer before whom the plaintiff appeared at his small claims hearing. Judge Doherty was the presiding judge at a scheduling conference at which plaintiff appeared, at which time plaintiff requested that the judge recuse himself. Judge Haese was the presiding judge at the hearing where summary judgment was entered against the plaintiff. The acts of each of these judicial defendants was of the kind normally performed by a judge. In each case the plaintiff dealt with the judicial defendants in their respective judicial capacities. Moreover, the court believes that this case clearly

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hierarchy, from magistrates to justices of the peace, to family court commissioners."); see also Ashbrook v. Hoffman, 617 F.2d 474 (7th Cir. 1980)

falls within the rationale for judicial immunity expressed in Bradley. The court therefore dismisses plaintiff's claims for damages against Judge Doherty, Judge Haese and Court Commissioner Liska on the grounds of judicial immunity.

The court now turns its attention to the issue of whether court clerk Joanne Kelly and calendar clerk Raymond Kress are entitled to judicial immunity. It was held in a recent Seventh Circuit case that "(a)uxillary judicial personnel who perform functions at once integral to the judicial process and nonmechanical are entitled to absolute immunity from damages liability for the acts performed in the discharge of those functions, just as judges are." Scruggs v. Moellering, 870 F.2d 376, 377 (7th Cir. 1989) citing Eades, 810 F.2d at 726. Both jobs are certainly integral to the judicial process and neither the court clerk's or the calendar clerk's job is mechanical. Both Ms. Kelly and Mr. Kress exercise discretion in the normal course of their activities. And, even if the court were to believe defendant's assertions that Ms Kelly purposely failed to send a notice to the plaintiff, and Mr. Kelly rigged the tabbing system[3], those actions in themselves would amount to the exercise of discretion. See Eades, 810 F.2d at 726 (court clerk and court reporter who falsified documents were exercising discretion).

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3 These allegations the court only takes to be true for purposes of this argument. The court in no way expressing the opinion that Ms. Kelly or Mr. Kress were involved in any wrongdoing.

The rationale for including the court clerk and calendar clerk under the cloak of judicial immunity, as expressed in Scruggs, supra, is particularly appropriate here:

> The danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters and other judicial adjuncts--alleging as here a conspiracy between the adjunct and the judge--warrants this extension of the doctrine.

Scruggs, 870 F.2d at 377. The court dismisses plaintiff's claims against court clerk Joanne Kelly and calendar clerk Raymond Kress.

B. THE PRIVATE DEFENDANTS

Since the court has found the judges and court personnel to be entitled to absolute judicial immunity, the court must reach the question of whether the "private"defendants[4] were acting under color of law, so as to allow a section 1983 action to proceed against them. Until relatively recently, most courts, including the Seventh Circuit, held that a private person did not act under color or law where he or she allegedly conspired with an absolutely immune defendant such as a judge.[5]

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4 Catherine Bichler, Attorney Janet Resnick and Attorney Sidney Sodos are collectively referred to in this manner for ease of reference.

5 See Briley v. California, 564 F.2d 849 (9th Cir. 1977); Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977), cert. denied, 434 U.S. 968 (1977); Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977), cert denied, 434 U.S. 972 (1977); Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974); Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965).

However, in 1980 the United States Supreme Court decided Dennis v. Sparks, 449 U.S. 24 (1980). In that case, the Court held that a private defendant who allegedly conspires with an absolutely immune state judge is not derivatively protected by that judge's absolute immunity. In light of this holding, the court finds that plaintiff has alleged sufficient facts to meet the "color of law " hurdle. The court makes this finding on the basis of plaintiff's allegation that state judges conspired with the private parties.

Since the plaintiff has satisfied the "color of law" requirement, the court must address whether plaintiff's complaint states a cause of action against the private defendants. It has been held that there "must be some basis more than mere conclusory allegations that there was an agreement under color of state law to violate the plaintiff's constitutional rights, privileges or immunities." Grow v. Fisher, 523 F.2d 875, 879 (7th Cir. 1975).[6]

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6 Accord, Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983) ("When a plaintiff in a section 1983 actions attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleading must specifically present facts tending to show agreement and concerted action."); Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977) ("It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts.")

Plaintiff alleges that one of the judges contacted the law firm of Jacobson, Sodos, & Krings to plan an elaborate conspiracy designed to deprive plaintiff of his civil rights. This allegation is absolutely unsubstantiated by any of the facts plaintiff alleges in paragraphs 5 through 14 of his complaint. Moreover, no inference of conspiracy can be drawn from these facts. What the plaintiff considers to be "the facts generally detailing the conspiratorial agreement" (paragraphs 16 through 25 of plaintiff's complaint) are for the most part baseless and conclusory inferences which are not sufficient to create a cause of action sounding in conspiracy.

The court is not unmindful of its duty to construe pro se pleadings liberally. Nor it is unmindful of the validity of plaintiff's argument that conspiracies

> by their nature are rarely ever proved on direct evidence. Plaintiff never had a tap on any of the telephones of any of the defendants nor did he ever overhear any of their conversations. The pleadings in any conspiracy case will usually appear somewhat conclusory and they are allowed to be. It is only when a pleading is strewn with bald assertions unsupported by any facts that it may properly be considered a candidate for summary dismissal.

Plaintiff's Answering Brief in Opposition to Defendant Jacobson, Sodos & Krings' Motion to Dismiss at 4. In this case the court finds the plaintiff's pleadings to be "strewn with bald assertions unsupported by any facts," and accordingly plaintiff's section 1983 claim is dismissed against the private defendants.[7]

IV. LOOSE ENDS

A. Injunction Against Court Commissioner Liska

Plaintiff has also sought injunctive and declaratory relief against Court Commissioner Liska. The injunction would enjoin Liska and the other court commissioners from "refusing to enforce the provisions of valid Wisconsin landlord and tenant law as embodied in Chapter 704 Wisconsin Statutes."

There is no judicial immunity from a complaint for injunctive relief. Pulliam v. Allen, 466 U.S. 522 (1984). This does not, however, prevent the court from finding that a claim for injunctive relief fails to state a claim upon which relief can be granted. The court finds Commissioner Liska's decision in the small claims case from which this action arose to be within the bounds of Wisconsin landlord tenant law. Since Commissioner Liska has in this court's view correctly applied Wisconsin law, plaintiff's claim for inunctive relief is dismissed for failure to state a claim.

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7 The plaintiff seems to misapprehend what constitutes a "fact". In the same brief mentioned above, plaintiff states he "has adduced at least 18 cogent facts in support his claim and thus could never properly be considered for summary dismissal." The court assumes these "facts" are the 18 subsections of paragraph 21 of his complaint. These "facts" are not actually facts at all; rather, they are improper inferences mixed with fact.
An inference is a conclusion drawn from facts. American Heritage Dictionary 659 (2nd ed.1985). An example of the difference between an inference and a fact is the following. Plaintiff alleges at paragraph 21(c) of his complaint that "defendant Bichler failed to appear at the January 29,

B. Pendent State Law Claim

The plaintiff's complaint at paragraph 4 states:

The plaintiff invokes the pendent jurisdiction of this court to consider the claims against the defendant's state actors under Wis. Stat. sec. 895.46 to pay any judgment which may be rendered against the state actors.

This allegation contains the sole reference to "pendent jurisdiction." The complaint contains no statement of a claim or claims for relief against any of the defendants which may be characterized as pendent state law claims. Therefore, the court will dismiss this allegation on two grounds. First, the complaint does not allege a pendent state law claim. Second, the claim is moot since plaintiff has not recovered anything against a "state actor."

C. The Mysterious John Doe Defendants

The caption to plaintiff's lawsuit includes a reference to "unknown and unidentified Milwaukee County Circuit Court employees herein denominated John Doe I, John Doe II, and John Doe III." This is the only reference to these persons in the entire complaint.

1987 scheduling conference held in Judge Doherty's court, forcing the conclusion that Bichler was prepared to accept a default loss." Plaintiff can ascertain whether Bichler appeared or not; either she did or she did not. Thus, the plaintiff may state as "fact" that Bichler did not show. But why she did not show can only be inferred--the inference that she forgot is as equally plausible as the inference that she was willing to accept a default. The true reason that she did not show is not within the plaintiff's knowledge and is at best a conclusion inferred from a a fact.

Plaintiff has not adequately alleged that the Does have connection to this lawsuit. None of the Does are alleged to have participated in a conspiracy against plaintiff. Thus, not only has plaintiff failed to state a claim upon which relief may be granted against the Does, plaintiff has failed to state any claim for relief at all against them. The Does therefore are dismissed for failure to state a claim against them.

Therefore,

IT IS ORDERED that plaintiff's 42 U.S.C. 1985(2) claim be and the same is hereby DISMISSED against all defendants; and,

IT IS FURTHER ORDERED that plaintiff's 42 U.S.C. 1985(3) claim be and the same is hereby DISMISSED against all defendants; and,

IT IS FURTHER ORDERED that plaintiff's 42 U.S.C. 1983 claim be and the same is hereby DISMISSED against all defendants; and,

IT IS FURTHER ORDERED that plaintiff's claim for injunctive relief against defendant Liska be and the same is hereby DISMISSED; and

IT IS FURTHER ORDERED that plaintiff's pendent state law claims be and the same are hereby DISMISSED insofar as plaintiff ever stated a pendent state law claim.

IT IS FURTHER ORDERD that plaintiff's lawsuit be and the same is hereby DISMISSED in its entirety.

Dated at Milwaukee, WI this 3rd day of October, 1989

BY THE COURT:

/s/ J.P. Stadtmueller
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted August 2, 1990*
August 20, 1990

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

BEFORE

HON. WILLIAM J. BAUER, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge

DAVID HELDSTAB,
Plaintiff-Appellant

No. 89-3323 v.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 88 C 768
Joseph P. Stadtmueller, Judge.

FRANK LISKA, Milwaukee County Court Commissioner, THOMAS DOHERTY, Milwaukee County Circuit Judge (Branch 27)
WILLIAM HAESE, Milwaukee County Circuit Judge (Branch 22)
RAYMOND KRESS, Calendar Clerk, Milwaukee County Circuit Courts,
JOANNE KELLY, Clerk, Milwaukee County Circuit Court (Branch 27), Unknown and unidentified Milwaukee County Circuit Court Employees, herein Denominated as JOHN DOE I, JOHN DOE II, JOHN DOE III, JANET RESNICK, SIDNEY SODOS, JACOBSON, SODOS & KRINGS, Milwaukee and CATHERINE BICHLER,
Defendants-Appellees.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be

O R D E R

Appellant David Heldstab believes that the appellees in this case conspired to make him lose his state court lawsuit against appellee Catherine Bichler and to force him to pay her legal fees. Heldstab filed a complaint alleging violations of 42 U.S.C. secs. 1983, 1985(2) and 1985(3) which the district court dismissed on grounds of judicial immunity and failure to state a claim on which relief could be granted. Heldstab took a timely appeal to this Court, and we affirm.

This case began in Milwaukee County, Wisconsin's small claims court. Heldstab, a landowner, had rented an apartment to Catherine Bichler, with an agreement that if Bichler were to move out during the winter months she would forfeit her security deposit. Bichler did in fact move out during November 1985, giving only short notice--less than the 28 days notice required by Wisconsin law. Heldstab retained Bichler's security deposit, which was approximately equal to one month's rent, and he demanded an additional month's rent as well. When Bichler refused to pay, Heldstab sued in the small claims court. Court Commissioner Liska ruled that Heldstab was entitled to keep the security deposit but was not entitled to any more rent.

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helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal is submitted on the briefs and record.

Displease with this outcome, Heldstab took the case to the Milwaukee County Circuit Court and demanded a jury trial. The case was assigned to Branch 27, the courtroom of Judge Thomas Doherty.[1] Soon a scheduling conference was set for January 29, 1987. Heldstab alleges that Clerk Joanne Kelly, acting at Judge Doherty's direction, failed to send him notice of that conference. Heldstab nonetheless learned of the date and he appeared at the appointed time. Bichler failed to appear. The record does not reflect exactly what went on at that conference, but when it was over Judge Doherty recused himself from the case and sent it back for assignment to another judge. Heldstab believes that Judge Doherty forced Clerk Raymond Kress not to randomly assign the case, but instead to assign it to Branch 22, the courtroom of Judge William Haese.

Judge Haese held a pretrial conference on April 1, 1988, at which Heldstab and Bichler both appeared pro se, and a trial date was set. Before trial, though, Bichler obtained counsel. According to Heldstab, either Judge Doherty or Judge Haese called one of the senior members of the law firm of Jacobson, Sodos & Krings (probably Sidney Sodos), and the two generally agreed to punish Heldstab. Apparently they agreed that Heldstab would lose his case against Bichler and would be forced to

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1 Heldstab had appeared before Judge Doherty before, and had in fact requested in an earlier case that Judge Doherty recuse himself because of perceived bias against Heldstab.

pay Bichler's legal fees. We note that Heldstab offered no indication of what evidence he would use to support this version of events, but did attach to his pleadings an affidavit of a private investigator he had hired. The investigator stated that Bichler had said she located Jacobson, Sodos & Krings through a referral service or through the Yellow pages.

Attorney Janet Resnick of the Jacobson firm filed an answer on behalf of Bichler, raising two affirmative defenses and asking that Heldstab be made to pay Bichler's legal fees on the ground that the action was frivolous. Heldstab filed a motion for summary judgment which was argued on May 18, 1988. Sidney Sodos appeared on behalf of Bichler. Judge Haese determined that there were no grounds for granting Heldstab's motion for summary judgment and no grounds to deny Bichler judgment. The court granted Bichler's motion for fees as well. Heldstab did not appeal this judgment, but instead applied unsuccessfully to the Wisconsin Supreme Court for a supervisory writ directed against Judge Haese.

Heldstab then filed the present lawsuit, naming as defendants every person named above (except the members of the Wisconsin Supreme Court). For good measure he added John Doe defendants Numbers I, II and III, employees of the County Clerk's office. The district court found that Commissioner Liska, Judge Doherty and Judge Haese were all protected from suit by absolute judicial immunity, and that the clerks were sim-

ilarly immunized. The suit against the private defendants, Bichler, Resnick, Sodos and the firm of Jacobson, Sodos & Krings, was dismissed for failure to allege sufficient facts to support a charge that the defendants had conspired to act under color of state law. We agree with each of these conclusions and therefore affirm.

THE JUDGES

Judges are absolutely immune from suit for actions taken in their judicial capacities. Their judicial acts are protected unless the judge acted "in the clear absence of all jurisdiction." Bradley v. Fisher, 80 U.S. (13 Wall) 335, 351 (1872); Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). If the acts complained of are of the kind normally performed by a judge, and if the plaintiff was dealing with the judge in his judicial capacity, then suit cannot be entertained. Dellenbach v. Letsinger, 889 F.2d 755, 759 (7th Cir. 1989). Judicial immunity is a defense so long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction. Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986). Even taking all the allegations of the complaint as true, Commissioner Liska, Judge Doherty and Judge Haese did nothing but deal with Heldstab's rent dispute. These are plainly acts normally performed by judges, and they dealt with Heldstab as a judge deals with a litigant. Unless the judges were acting "in the clear absence of all jurisdiction," they are entitled to the protection of absolute immunity.[2]

It is plain to us, as it was to the district court, that the judges, even if they did all they were alleged to have done, did not act in the clear absence of all jurisdiction. The small claims case was unquestionably before Commissioner Liska, and the case was properly transferred to Judge Doherty. Even if Judge Doherty acted wrongly under state law in having the case reassigned to Judge Haese, that is not an act clearly outside a judge's authority.

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2 Heldstab urges us to adopt a different standard, denying immunity where a judge's acts are a "clear abuse of all jurisdiction of subject matter." International Union, UAW v. Greyhound Lines, Inc., 701 F.2d 1181, 1185 (6th Cir. 1983); Doe v. McFaul, 599 F.Supp. 1421, 1430-31 (N.D. Ohio 1984). This standard, like the more familiar "absence of all jurisdiction" standard, is derived from Bradley v. Fisher, 80 U.S.(13 Wall.) 335 (1872). As far as we can tell, there is no significant difference between the two formulations. Both require a judge to defend a lawsuit only if the conduct complained of was so far beyond the court's jurisdiction as to be a non-judicial act. It would be a clear abuse of jurisdiction of the subject matter to proceed in the absence of all jurisdiction; and it would be an act in absence of all jurisdiction to proceed where it is obvious to all that there is no subject matter jurisdiction.

3 Judge Doherty and Judge Haese also argue that they were not properly served with process in this case. Service was made by delivery of the summons and complaint to the judges' clerks. Heldstab does not argue that the clerks were authorized by appointment or by law to receive process for the judges. We conclude, then, that the judges were not properly served under Fed. R. Civ. P. 4(d). This is an alternative ground for affirmance as to them.

See John v. Barron, 897 F.2d 1387, 1392 (7th Cir.), petition for cert. filed, No. 89-1961 (U.S. June 4, 1990). Deciding the outcome of a case, even if the decision is taken before evidence is formally heard, is an act within a judge's jurisdiction. Id. at 1391-92. And even if one of the judges brought Jacobson, Sodos & Krings into the case, appointing counsel is an act commonly performed by judges. Heldstab's arguments to the contrary amount to nothing more than the untenable argument that a judge has no jurisdiction to decide a case wrongly.[3]

THE CLERKS

We have held that a court's auxiliary personnel (including clerks) performing nonmechanical functions are shielded from civil liability under the doctrine of judicial immunity. Lowe v. Letsinger, 772 F.2d 308, 313 (7th Cir. 1985). Heldstab relies heavily on Lowe for the proposition that the clerks were performing purely ministerial functions. In Lowe, this Court held that a court clerk who failed to notify a party that judgment had been entered against him was not entitled to immunity because the typing and mailing of the notice were nondiscretionary functions. But see, Scruggs v. Moellering, 870 F.2d 376 (7th Cir.1989) (court reporter exercises discretion in preparing transcripts); Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir. 1987) (clerk's entry of false item on docket sheet was a discretionary act because it was a breach of duty). In this case, Heldstab alleges that Joanne Kelly, acting on the instructions of Judge

Doherty, failed to send Heldstab notice of the scheduling conference, and that Raymond Kress, also acting at Judge Doherty's direction, assigned the case to Judge Haese. Court personnel, whether exercising discretion or not, are not liable for acts performed on a judge's orders. Valdez v. City of Denver, 878 F.2d 1285, 1289 (10th Cir. 1989) ("(I)t is simply unfair to spare the judges who give orders while punishing the officers who obey them."). Clerks Kelly and Kress are entitled to immunity. No allegations were ever made against the John Doe defendants, so they need no immunity.

THE PRIVATE PARTIES

The private parties, Bichler, Sosos, Resnick and the law firm of Jacobson, Sodos & Krings, have no immunity from suit. The district court found that Heldstab had failed to state a claim against these defendants, and we agree. Heldstab's complaint purported to be brought under 42 U.S.C. secs. 1983, 1985(2) and 1985(3) The district court ruled that 42 U.S.C. sec. 1985(2) is inapplicable because (a) there was no allegation that force or threats were used to prevent Heldstab from appearing in a federal court, and (b) there was no allegation that any defendants were motivated by invidious class-based discriminatory animus. Similarly, 42 U.S.C. sec. 1985(3) is inapplicable because (a) there was no allegation of class-based animus, and (b) there was no allegation that Heldstab was prevented from voting. Heldstab has not contested these conclusions on appeal.

That leaves only the claim under 42 U.S.C. sec. 1983. To show that the private defendants acted under color of state law, Heldstab will have to show that they acted in concert with state actors. Dennis v. Sparks, 449 U.S. 24 (1980); Moore v. Market Place Restaurant, Inc., 754 F.2d 1336, 1352-53 (7th Cir. 1985). Heldstab has not alleged sufficient facts to support a conclusion that there was a conspiracy. It is not enough merely to raise a metaphysical possibility that the defendants might have conspired; there must be allegations of particularized facts which show the existence of a conspiracy. Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 198 (7th Cir. 1985). Heldstab's allegations cannot meet this standard.

The complaint contains only unsupported conclusory assertions that the defendants conspired with a state actor. Heldstab's allegations against the private actors are these: (1) At some time after January 29, 1987 (probably after April 17), either Judge Doherty or Judge Haese contacted someone at the firm of Jacobson, Sodos & Krings (probably Sidney Sodos); (2) Those parties agreed that the firm would represent Bichler in the rent dispute, that Bichler would win, and that Heldstab would be forced to pay the firm's fee; (3) That Sodos and Janet Resnick participated in the conspiracy by representing Bichler; and (4) That Bichler herself participated in the conspiracy by not calling a halt to it, and by falsely stating that she had located the firm through the Yellow pages.

To support these charges, Heldstab offers the following, which we take as true for purposes of this appeal: (1) Bichler was not forced to pay a retainer fee to Jacobson, Sodos & Krings even though firm policy demands a retainer in every case; (2) That no law firm Heldstab contacted was willing to take a case like Bichler's on the terms she received from the Jacobson firm; (3) That Sodos, a senior attorney, appeared at the hearing before Judge Haese when Resnick had filed the pleadings; (4) That no one acting with proper motives would spend five hundred dollars or more to defend a claim for only $230 (one month's rent and (5) That Heldstab lost his case before Judge Haese and was forced to pay Bichler's legal fees.

It is clear that the last three of these facts provide no evidence of any conspiracy. One side must lose in every litigation that proceeds to judgment, but that hardly shows that the winning side conspired with the judge. Neither is it evidence of conspiracy that a person engages an attorney to file an answer when he is sued. The fact that the amount involved is small makes no difference; many people feel unable to deal with the complexities of the law without the assistance of an attorney. Nor is the fact that more than one member of the law firm appeared on Bichler's behalf any evidence of conspiracy: one of the reasons lawyers form firms is to assist each other in meeting the demands placed on them by their caseloads. See In re Gubbins, 890 F.2d 30 (7th Cir. 1990).

This leaves only the fact that the Jacobson firm was willing to take the case without demanding a retainer. It requires a great leap of logic to stretch an attorney's willingness to waive a retainer into a conspiracy involving a judge, even if another attorney might not have been willing to act without a retainer. Heldstab seems to believe that the Jacobson firm had certain advance knowledge that Heldstab would be forced to pay their fee, but he has offered no facts to support the belief. Indeed, he does not even allege that the lawyers promised Bichler that Heldstab would pay the fees; he says only that they told her that she would not have to pay if she won the case. But Heldstab will not acknowledge any possibility that the lawyers might have really believed attorneys' fees would be properly awarded; he jumps immediately to the conclusion that the judge must have tipped them off. We will not reach such a conclusion without some factual support.

Heldstab may not proceed against the judicial defendants or their staffs because of judicial immunity. He has failed to allege facts which would show a conspiracy between private and public actors intended to deprive him of his federally-protected rights. The dismissal of his suit is therefore

AFFIRMED.